police to be a user of narcotics." Italics are appellant's.)

Appellant respectfully submits that the affidavit in this instant case does not allege even any hearsay that appellant was doing anything in violation of the law. Whereas in the Jones and Draper cases the hearsay allegation is in exact words that; (In the Jones case—that defendant was "selling narcotics in the apartment"; In the Draper case—that defendant was in possession of narcotics).

Petitioner's position is that the courts below acted upon an erroneous view, in conflict with the opinion of this Court in Henry v. United States (1959), —— U. S. ——, 80 S. Ct. ——, 4 L. Ed. 2d 134. At page 138 of the Henry case this Court said:

> "* * * common rumor or report, suspicion or even 'strong reason to suspect' was not adequate to support a warrant for arrest."

Petitioner can find no United States Supreme Court decision holding that the words "probable cause" mean anything different when applied to the basis (affidavit) for the issuance of a search warrant, than when applied to basis for a lawful arrest.

The Government in supporting this search warrant is confined to the statement of facts purporting to allege probable cause *in the affidavit itself*, and cannot expand this affidavit by later arguments.

United States v. Goodwin (1924), 1 F. 2d 36;
United States v. Casino, 286 F. 976 (1923);
United States v. Nichols (1950), 89 Fed. Supp. 953.

There is nothing in the affidavit herein defining "too hot", nor can the Government now attempt to supply its own definition. There is nothing in the affidavit to indicate that "sugar is an ingredient commonly used in the manufacture of distilled spirits", as the Government now tries to contend in its argument. There is nothing in the affidavit to show whether Clyde Rea was an inexperienced agent, or what his record with the Government was.

> "The smell of alcohol did not further the right of search or arrest. The alcohol would have smelled with or without stamps."
>
> United States v. Kind (1937), 87 F. 2d 315 at page 316.

> "The court or commissioner cannot, from the statement of the one fact that the investigator noticed about the premises an odor of fermenting mash, infer such a case."
>
> United States v. Goodwin (1924), 1 F. 2d 36 at page 37;
>
> U. S. v. Nichols, 89 F. Supp. 953 (1950).

> "To put it another way the affidavit here must stand scrutiny as to whether it contains *facts* which constituted probable cause to conclude that a violation of federal *tax* laws had occurred. If it fails to meet that test, it is fatally defective and must be struck down under the proscription of the Fourth Amendment."
>
> United States v. Office No. 508 Ricou-Brewster Bldg. (1954), 119 Fed. Supp. 24, at page 27.

"It is not enough that on the hearing other grounds may appear, even though not upon evidence extracted by the search itself. The showing for the issue must be enough to stand alone and must be proved upon the hearing if challenged. It will not do to abandon the 'reasonable cause' first asserted and support the search upon a new charge. In this respect, affidavits are like pleadings. * * * Hence if those allegations on their face be inadequate, the warrant can by no possibility be legal."

United States v. Casino (1923), 286 F. 976 at page 977 (Judge Learned Hand).

As far as the record in the instant case shows, the meaning of the statement attributed to "Mary Peoples" is unexplained and undefined. The alleged rumor is practically meaningless. On this record petitioner submits that there was far from enough evidence against him to justify issuance of a warrant. So far as this record shows petitioner had not even been suspected of criminal activity prior to this time.

Petitioner does not contend that hearsay alone renders an affidavit insufficient, nor that evidence required to establish guilt is necessary, but petitioner does take the position that an affidavit to establish probable cause must state *facts* upon which affiant's belief that there is cause to search is based, and that mere common rumor or report, suspicion or even strong reason to suspect is NOT ENOUGH, and that the "odors of fermenting mash" are not such facts.

CONCLUSION.

The ruling in the instant case by the Court of Appeal's 7th Circuit contravenes the principle laid down by the United States Supreme Court in the Henry case as quoted above.

For these reasons petitioner respectfully prays that this petition for Certiorari be granted, and the holding of the lower courts reversed.

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